Golden Support Sdn Bhd v Tribunal Pengurusan Strata Malaysia & Anor

HIGH COURT (SEREMBAN) — APPLICATION FOR JUDICIAL REVIEW NO NA-25–02–01 OF 2017
ABU BAKAR JAIS J
22 MARCH 2019

Limitation — Accounts — Running account — Management corporation ('MC') of shopping complex claimed 11 years of unpaid maintenance charges from owner of parking lots — Defendant contended that MC's claim was time-barred under s 6 of the Limitation Act 1953 ('the LA') — Whether the maintenance charges were running accounts and therefore not caught by s 6 of the LA — Whether even though MC had not specifically pleaded running account, reading of the whole pleading showed it was based upon running account

The second respondent ('R2') was the management corporation of a shopping complex in which the applicant owned 134 parking lots. R2 filed a claim with the first respondent ('the tribunal') against the applicant for payment of 11 years of outstanding maintenance charges for the parking lots. Contending that R2's claim was time-barred, the applicant counterclaimed against R2 for wrongfully renting out the parking lots to third parties and keeping the rentals earned therefrom. The applicant had separately obtained judgment against R2 in the High Court for a declaration over the ownership of the parking lots and also for an injunction. Assessment of damages ordered to be paid to the applicant was pending at the time R2 filed the claim with the tribunal. The instant judicial review application was against the tribunal's decision allowing R2's claim and dismissing the applicant's counterclaim. The applicant argued that the tribunal's decision was illegal, irrational, procedurally improper and disproportionate in that, inter alia: (a) R2's claim was time-barred under s 6 of the Limitation Act 1953 ('the LA'); (b) the Tribunal failed to take into account the fact that the applicant had already obtained judgment against R2 in the High Court and that damages payable were pending determination; and (c) the tribunal gave no reasons for its decision and had wrongly shifted the burden onto the applicant to prove that R2 did not render maintenance services in respect of the parking lots. R2 replied that its claim was not caught by the LA because the maintenance account was a 'running account'. R2 also said the Tribunal's decision was final and binding under the Strata Management Act 2013 ('the SMA') and no 'serious irregularity' had been shown to allow it to be set aside.

Held, dismissing the application:

(1) The maintenance charges claimed by R2 were running accounts and therefore not caught by s 6(1)(d) of the LA. Therefore, the argument that s 105(2) of the SMA could not be applied retrospectively to deprive the applicant of a prior-accrued right was irrelevant and did not arise. It was also incorrect for the applicant to say that R2 had not pleaded the claim for running account. The whole of R2's claim had to be viewed to appreciate that it had indeed been pleaded (see paras 12–15 & 17).

(2) The applicant's contention that the tribunal had not given reasons for its decision was plainly untrue because it did provide the grounds for its award. The grounds showed that the burden of proof was not wrongly shifted as alleged by the applicant as the tribunal had required R2 to prove the claim for the maintenance charges. There was no sufficient reason for the court to not affirm the tribunal's decision (see para 18).

(3) The case before the High Court and that before the tribunal were not the same. In the High Court, it was in respect of a declaration and injunction regarding ownership of the parking lots. Before the tribunal, it was a claim for failure to pay maintenance charges. Thus, R2 was not prohibited from making its claim before the tribunal despite the High Court's judgment favouring the applicant and the pending assessment of damages. The tribunal, which had no jurisdiction over the applicant's claim in the High Court, did not have to stay its proceedings for the assessment of damages to be completed. There was nothing sub judice in not staying the proceedings. As the claims were entirely different, the applicant's argument that s 106 of the SMA had been infringed was incorrect (see para 20).

(4) With regard to the applicant's argument that witnesses were not called for the applicant's allegation of breach of trust and misappropriation against R2, the evidence before the tribunal was sufficient to decide that R2 had made out its claim. The applicant could have called witnesses but it did not. In any event, the tribunal did not find that the allegations of breach of trust and misappropriation were proven. The grounds of award showed that the tribunal had considered the applicant's defence and counterclaim (see para 21).

(5) The tribunal's decision was final and binding under s 120 of the SMA and could only be set aside if there was 'serious irregularity' (see s 121 of the SMA). Since there was no serious irregularity affecting the tribunal's award, there was no reason to disturb its decision (see paras 23–24).

(6) The tribunal was only named as a formal party to the instant judicial review application and was not required to affirm and file an affidavit in the proceedings (see para 22).

[Bahasa Malaysia summary

Responden kedua ('R2') adalah perbadanan pengurusan sebuah kompleks membeli-belah di mana pemohon memiliki 134 tempat letak kereta. R2 memfailkan tuntutan dengan responden pertama ('tribunal') terhadap pemohon untuk pembayaran 11 tahun caj penyelenggaraan yang belum dijelaskan untuk tempat letak kereta. Mempertikaikan bahawa tuntutan R2 telah dihalang masa, pemohon menuntut balas terhadap R2 kerana secara salah menyewakan tempat letak kereta kepada pihak ketiga dan menyimpan sewa yang diperoleh daripadanya. Pemohon telah memperoleh penghakiman berasingan terhadap R2 di Mahkamah Tinggi untuk pengisytiharan mengenai pemilikan tempat letak kereta dan juga untuk injunksi. Penilaian ganti rugi yang diperintahkan untuk dibayar kepada pemohon belum selesai pada masa R2 memfailkan tuntutan dengan tribunal. Permohonan semakan kehakiman ini adalah bertentangan dengan keputusan tribunal yang membenarkan tuntutan R2 dan menolak tuntutan balas pemohon. Pemohon berpendapat bahawa keputusan tribunal adalah tidak sah, tidak masuk akal, tidak wajar dan tidak setimpal kerana, antara lain: (a) tuntutan R2 telah dibatasi masa di bawah s 6 Akta Had Masa 1953 ('AHM'); (b) tribunal gagal mengambil kira hakikat bahawa pemohon telah memperoleh penghakiman terhadap R2 di Mahkamah Tinggi dan ganti rugi yang perlu dibayar masih menunggu keputusan; dan (c) tribunal tidak memberi sebab-sebab keputusannya dan telah salah mengalihkan beban kepada pemohon untuk membuktikan bahawa R2 tidak memberikan perkhidmatan penyelenggaraan berkenaan dengan tempat letak kereta. R2 menjawab bahawa tuntutannya tidak ditangkap oleh LA kerana akaun penyelenggaraan itu adalah 'akaun yang tersedia'. R2 juga berkata keputusan Tribunal adalah muktamad dan terikat di bawah Akta Pengurusan Strata 2013 ('APS') dan tidak ada 'salah arahan serius' yang ditunjukkan untuk membolehkannya diketepikan.

Diputuskan, menolak permohonan:

(1) Caj penyelenggaraan yang dituntut oleh R2 adalah akaun yang tersedia dan oleh itu tidak ditangkap s 6(1)(d) AHM. Oleh itu, hujahan bahawa s 105(2) APS tidak boleh diguna pakai secara retrospektif untuk menafikan pemohon hak terdahulu adalah tidak relevan dan tidak timbul. Ia juga salah bagi pemohon untuk mengatakan bahawa R2 tidak memplid tuntutan untuk akaun yang tersedia. Seluruh tuntutan R2 perlu dilihat untuk menghargai bahawa ia memang telah diplid (lihat perenggan 12–15 & 17).

(2) Pertikaian pemohon bahawa tribunal tidak memberikan sebab untuk keputusannya adalah jelas tidak benar kerana ia memberikan alasan untuk award tersebut. Alasannya menunjukkan bahawa beban bukti tidak dialih dengan salah seperti yang didakwa oleh pemohon kerana tribunal telah meminta R2 untuk membuktikan tuntutan untuk caj

penyelenggaraan. Tidak ada sebab yang mencukupi bagi Mahkamah untuk tidak mengesahkan keputusan tribunal (lihat perenggan 18).

(3) Perkara di hadapan Mahkamah Tinggi dan di hadapan tribunal tidak sama. Di Mahkamah Tinggi, ia berkenaan dengan pengisytiharan dan injunksi mengenai pemilikan tempat letak kereta. Di hadapan tribunal, ia adalah berkenaan tuntutan kegagalan membayar caj penyelenggaraan. Oleh itu, R2 tidak dilarang membuat tuntutan di hadapan tribunal walaupun penghakiman Mahkamah Tinggi memihak kepada pemohon dan penilaian ganti rugi yang masih belum selesai. Tribunal, yang tidak mempunyai bidang kuasa ke atas tuntutan pemohon di Mahkamah Tinggi, tidak perlu menangguhkan prosidingnya untuk menilai ganti rugi untuk diselesaikan. Tiada apa-apa sub judice dalam tidak menangguhkan prosiding. Memandangkan tuntutan tersebut sama sekali berbeza, hujahan pemohon bahawa s 106 APS telah dilanggar adalah salah (lihat perenggan 20).

(4) Berkenaan dengan hujahan pemohon bahawa saksi tidak dipanggil untuk tuduhan oleh pemohon berkenaan pelanggaran amanah dan penyelewengan terhadap R2, keterangan di hadapan tribunal cukup untuk memutuskan bahawa R2 telah membuat tuntutannya. Pemohon boleh memanggil saksi tetapi tidak. Walau apa pun, tribunal tidak mendapati bahawa tuduhan pelanggaran amanah dan penyelewengan telah terbukti. Alasan award menunjukkan bahawa tribunal telah mempertimbangkan pembelaan dan tuntutan balas pemohon (lihat perenggan 21).

(5) Keputusan tribunal adalah muktamad dan terikat di bawah s 120 APS dan hanya boleh diketepikan sekiranya terdapat 'salah arahan serius' (lihat s 121 APS). Oleh kerana tidak terdapat sebarang salah arahan serius yang mempengaruhi award tribunal, tidak ada alasan untuk mengganggu keputusannya (lihat perenggan 23–24).

(6) Tribunal hanya dinamakan sebagai parti formal untuk permohonan semakan kehakiman ini dan tidak dikehendaki mengesahkan dan memfailkan afidavit dalam prosiding (lihat perenggan 22).]

Notes

For cases on running account, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2310–2311.

Cases referred to

Bajaj Textiles Ltd v Gian Singh & Co Ltd [1968] 1 MLJ 279, FC (refd)

Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985) [2018] 4 MLJ 284, CA (refd)

Government of Malaysia v Mohamed Amin bin Hassan [1986] 1 MLJ 224, SC (refd)

A *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697, FC (refd)
Malayan Banking Bhd v Wembley Industries Holdings Bhd [2012] MLJU 91; [2012] 5 CLJ 956, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
B *Perbadanan Pengurusan Megan Avenue 1 v Harcharan S Sidhu & Anor* [2017] 11 MLJ 736, HC (refd)
Plaza 393 Management Corporation (established under the Strata Titles Act 1985) v Ekuiti Setegap Sdn Bhd [2016] MLJU 1177, HC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ
C 145, FC (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(d)
D Rules of Court 2012 O 53
Strata Management Act 2013 ss 105(2), 106, 120, 121
Strata Titles Act 1985

Joshua Dharmaj (Sumathi Shanmugam with him) (Bell & Lee) for the applicant.
E *Lee Kong Poh (Lee Kong Poh & Assoc) for the second respondent.*

Abu Bakar Jais J:

A man who pays his bills on time is soon forgotten — Oscar Wilde

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INTRODUCTION

[1] This is an application for judicial review under O 53 of the Rules of Court 2012 filed by the applicant against the decision made by the first
G respondent in favour of the second respondent.

[2] Having heard submissions, the application is refused and this written judgment provides the reasons for the decision.

H BACKGROUND FACTS

[3] The applicant is a company. The first respondent is a tribunal established under the Strata Management Act 2013 ('the SMA') and the second respondent is a management corporation incorporated under the Strata Titles
I Act 1985. It is the management corporation of a shopping complex in Seremban known as KM Plaza.

[4] The applicant is the legal owner of 134 parking lots at KM Plaza. The applicant sued the second respondent (together with other defendants) in a

separate action at the High Court because the latter applied for strata titles thinking the applicant's parking lots were common property.

[5] The High Court gave judgment for the applicant and ordered damages to be assessed for the same. The assessment is still pending. This decision of the High Court is final as there was no appeal and thus there is nothing pending except the assessment.

[6] Subsequently, despite the High Court's decision, the second respondent filed action at the first respondent against the applicant. In this action, the second respondent claimed maintenance charges for the parking lots for 11 years, from 2004–2015. The applicant counterclaimed because the second respondent had wrongly rented out the parking lots of the former to others and wrongfully collected monies for the rentals.

[7] The first respondent decided in favour of the second respondent and dismissed the counterclaimed of the applicant. Hence the latter filed the present judicial review against that decision or award of the first respondent.

SUMMARY OF THE APPLICANT'S CONTENTIONS

[8] The gist of the applicant's arguments in support of the judicial review is as follows:

(a) the decision of the first respondent as a tribunal is subject to judicial review of the High Court;

(b) judicial review against the first respondent includes challenging the substance of the decision itself and not only the decision making process of hearing;

(c) the decision of the first respondent is wrong and invalid based on the Federal Court's case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 on the grounds that it is illegal, irrational, procedurally improper and not proportionate;

(d) it is illegal as the claim of second respondent is time-barred;

(e) it is illegal and procedurally improper as the decision of the first respondent for the second respondent contravened Limitation Act 1953 ('the LA') on statutory time limitation to bring action and the provision of the SMA because the first respondent cannot act in contravention of the statutes;

(f) it is also illegal and procedurally improper as the first respondent gave no reasons for its decision;

(g) it is irrational as it is unreasonable because it ignored the applicant's defence and counterclaim without giving reasons;

(h) it is also irrational as witnesses were not called for the applicant's allegation of breach of trust and misappropriation against the second respondent;

(i) it is irrational as there is no grounds of decision for the applicant to know whether relevant factors have been taken into account and whether irrelevant factors have been left out;

(j) it is also illegal and procedurally improper for the second respondent to file action at the first respondent as the High Court had made a decision in favour of the applicant;

(k) the first respondent ought to stay the action and refer the matter to the High Court pursuant to the provision of SMA;

(l) the decision of the first respondent is also illegal as in contravened the principle of sub judice as it should stay the proceedings for assessment of damages to be completed as ordered by the High Court;

(m) it is also illegal as the first respondent had shifted the burden of proof from the second respondent to the applicant in requiring the applicant to prove that the second respondent did not render maintenance services; and

(n) there is no affidavit in rebuttal by the first respondent.

SUMMARY OF THE SECOND RESPONDENT'S CONTENTIONS

[9] In essence the second respondent's submissions opposing the judicial review application is as follows:

(a) the decision of the first respondent is final and binding under the SMA;

(b) since it is final, the decision must be obeyed and can only be set aside if there is serious irregularity as required by SMA;

(c) there is no serious irregularity in the decision;

(d) the SMA provides the LA does not apply in the proceedings before the first respondent;

(e) on time limitation too, the applicant never disputed it has the obligation to pay the maintenance charges;

(f) the applicant is obligated by statutes to make the payment;

(g) as the debt of the applicant is based on 'running account', time limitation

does not apply;

(h) there is no basis for the applicant to argue the first respondent did not provide its reasons for its decision as the same had complied with the relevant provision of the SMA;

(i) in any event the first respondent did provide its reasons for the decision;

(j) the first respondent's has the jurisdiction to make the decision;

(k) the first respondent is in compliance with the law in the whole proceedings between the applicant and the first respondent;

(l) the decision is a normal decision and there is nothing unreasonable about the same;

(m) the first respondent acted within jurisdiction as provided under the SMA; and

(n) the applicant's counterclaim is not within the first respondent's jurisdiction.

THE COURT'S FINDINGS

[10] First is the need to determine the issue of whether the second respondent's claim at the first respondent is statute-barred by virtue of s 6(1)(d) of the LA that only permits the recovery of the sum allegedly owed by the applicant up till six years from the cause of action.

[11] In this regard there is a Court of Appeal's decision very relevant on this issue. The case is *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)* [2018] 4 MLJ 284. Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) now FCJ in delivering judgment first noted the decision of the High Court as follows:

> Under s 6(1) of the Limitation Act 1953, the action founded on contract shall not be brought after the expiration of six years from the date when the cause of action accrues. In this regard, the defendant submitted that the plaintiff was formed on 21 April 2008 whereas the plaintiff's claim was from 21 April 2008. The plaintiff's action filed on 15 March 2016 ie after the expiration of six years from the date on which the cause of action accrued, is time-barred.
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> Relying on *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor; Veronica Leong Poh Geok v Lim Cheng Poh* [2009] MLJU 1461; *Gulamabbas bin Mohamed Hussain v Bonus Properties Sdn Bhd & Anor* [2015] MLJU 2046; [2015] 1 LNS 1073 and *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91; [2012] 5 CLJ 956, the learned judge found that the plaintiff's statements of account are running accounts as whatever maintenance

charges that were not paid by the defendant were carried forward by the plaintiff to the subsequent months. The plaintiff's claim is therefore not time-barred under the Limitation Act 1953.

Her Ladyship then explained the decision of the Court of Appeal as follows:

> Before we proceed with the main issues, we wish to state at the outset that we find no appealable error in respect of the learned judge's finding that the plaintiff's claim is based on a running account. In *Wembley Industries Holdings Bhd*, it was held:
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> > ... a running account is a single account and not a composite of its various parts. A payment made on account of a running account is in respect of the entire outstanding balance, with the result that time is extended for the whole of the debt.
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> It appears, therefore that a running account will become statute-barred only if more than six years elapse between the supply of the last article under it and the last payment on account.
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> Consequently, we agree with the learned judge that the plaintiff's claim is not barred by limitation under s 6 of the Limitation Act 1953.

[12] I am bound by the decision above. Likewise I must also decide that the maintenance charges are running accounts and therefore not caught by s 6(1)(d) of the LA.

[13] Thus it does not matter that s 105(2) of the SMA stipulates as follows:

> For avoidance of doubt, the Limitation Act 1953 shall not apply to the proceedings of the Tribunal.

[14] As the maintenance charges are not caught by s 6(1)(d) of the LA because the same are running accounts, there is no issue that s 105(2) of the SMA as shown above cannot be applied retrospectively and deprive the applicant's right which had purportedly accrued prior to that date by virtue of s 6(1)(d) of the LA as mentioned earlier. Whether it cannot be applied retrospectively as contended by the applicant is not relevant because the maintenance charges are not caught by that provision or any other provisions of the LA. Hence, the various cases quoted by the applicant including *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1, *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 and *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 are all not relevant because these cases did not deal with running accounts. More importantly in citing these cases, with respect the applicant went off tangent in arguing any particular law cannot take away an accrued right. The fact is the provisions of the LA especially s 6(1) of the LA simply do not apply for the applicant. Thus

there is no issue that a written law has taken away a right already given to the applicant.

[15] The applicant also failed to appreciate that it cannot seek refuge under s 6(1)(d) of the LA to say that the second respondent's claim is time-barred because this statutory provision does not hinder or restrain a claim for running accounts for the maintenance charges. As such the second respondent indeed can make the claim before the first respondent for these charges.

[16] Besides there are few other cases that support the contention that when it is a running account, the claim is not time-barred (see *Perbadanan Pengurusan Megan Avenue 1 v Harcharan S Sidhu & Anor* [2017] 11 MLJ 736, *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91; [2012] 5 CLJ 956 and *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1968] 1 MLJ 279).

[17] Further, it is incorrect for the applicant to say that the second respondent had not pleaded the claim for running account. The whole of the second respondent's claim must be viewed to appreciate that this had indeed been pleaded. The same position is seen in *Plaza 393 Management Corporation (established under the Strata Titles Act 1985) v Ekuiti Setegap Sdn Bhd* [2016] MLJU 1177 as follows:

> The defendant submits that the plaintiff did not plead specifically the running account and thus the plaintiff is precluded from relying on it. I am of the view that despite the plaintiff not pleading specifically its reliance on the running account, from a reading of the plaintiff's pleadings as a whole, it is obvious that the plaintiff's claim is based on not only current outstanding maintenance charges but also include whatever sums that were not paid, and have been carried forward to the plaintiff's current SOA. In essence, it is clear that the plaintiff's claim is based on a running account. Therefore, the plaintiff is allowed to raise it and rely on the running account in the SOAs in its evidence and submissions.

[18] Next is the issue on whether the first respondent did provide reasons for its decision. The applicant's submission that the first respondent gave no reasons for its decision is plainly untrue because indeed the first respondent did provide the grounds of awards dated 21 August 2017. In it, the first respondent dealt with the issues before the same and explained the reasons in giving the award. This includes the applicant's allegation that the first respondent had wrongly shifted the burden of proof. There is no shifting of burden as the first respondent indeed had required the second respondent to prove the maintenance charges. In essence, there is no sufficient reasons for this court not to affirm that decision of the first respondent. This court should not be in the habit of overturning the decision of the inferior tribunal just because it has the power to review the same.

[19] Furthermore, even if there is a delay in giving the grounds of award, this does not mean it is produced as an afterthought. It is acceptable for the first respondent to reflect on the evidence, hear submissions, consider the same, deliver its decision and only then write the grounds of award. Obviously time is needed in all these actions. Therefore the delay is expected. In any event, the delay is not too long. On the contrary, it would be much worse if the grounds of award by the first respondent is spontaneously or swiftly given, as it demonstrates that the same has the potential of not being a considered and reasoned decision.

[20] Also, the cases before the High Court and the first respondent were not the same. In the High Court it was in respect of declaration and injunction regarding ownership of the parking lots. Before the first respondent, it was for the claim on failing to pay maintenance charges. Thus the second respondent is not prohibited in making its claim before the first respondent despite the High Court pending assessment for damages for the applicant. The first respondent had no jurisdiction for the claim of the applicant at the High Court then but was well within jurisdiction for the second respondent's claim for maintenance charges. As such, the first respondent need not stay the proceeding for the assessment of damages to be completed at the High Court. There is nothing sub judice in not staying the proceeding. Therefore, as the claims are entirely different, the argument of the applicant that s 106 of the SMA had been infringed is with respect incorrect. The provision states as follows:

> (1) Where a claim is filed with the Tribunal and the claim is within the Tribunal's jurisdiction, the issues in dispute in that claim, whether as shown in the initial claim or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless —
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> (a) the proceedings before the court were commenced before the claim was filed with the Tribunal; or
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> (b) the claim before the Tribunal is withdrawn, abandoned or struck out.
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> (2) Where paragraph (1)(a) applies, the issues in dispute in the claim to which those proceedings relate, whether as shown in the initial claim or emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the claim before the court is withdrawn, abandoned or struck out.

[21] It is also wrong for the applicant to say the decision of the first respondent is irrational as witnesses were not called for the applicant's allegation of breach of trust and misappropriation against the second respondent. The evidence before the first respondent was already sufficient in

deciding the second respondent had made out its claim. The first respondent in any event did not find that applicant's allegation of breach of trust and misappropriation was proven. The grounds of award showed at paras 7–12 that the defence and counterclaim of the applicant had been considered. The applicant was also free to call witnesses, but failed to do so before the first respondent.

[22] Further, there is also no requirement for the first respondent to affirm an affidavit for this judicial review application. For those who are familiar with inferior tribunals upon which its decisions are challenged, the same is only named as a formal party to an action. It is similar to Industrial Court's decisions. The Chairman of the Industrial Court does not file an affidavit in reply. Thus the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 on the need for the first respondent to reply affidavit as argued by the applicant is not applicable nor relevant.

[23] It is also to be noted that the decision of the first respondent is final and binding as stipulated in s 120 of the SMA that reads as follows:

> An award made under subsection 112(3) or section 117 shall —
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> (a) subject to section 121, be final and binding on all parties to the proceedings; and
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> (b) be deemed to be an order of a court and be enforced accordingly by any party to the proceedings.

And the decision of the first respondent can only be set aside if there is serious irregularity. This is said in s 121 of the SMA as follows:

> A party to the proceedings of the Tribunal may, upon notice to the other party and to the Tribunal, apply to the High Court challenging an award in the proceedings on the ground of serious irregularity affecting the awards.

[24] There is no serious irregularity affecting the award because of the explanations on the facts and law as above. Therefore there is no reasons to disturb the decision of the first respondent.

CONCLUSION

[25] Based on all the reasons explained, the judicial review application cannot be granted for the applicant. The applicant had failed to challenge the award handed by the first respondent. Hence it is only right for the same to be dismissed.

A *Application dismissed.*

Reported by Ashok Kumar

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